



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUN 1 0 2009

Stephen E. Hershkowitz, Esq.
Sandler, Reiff & Young, PC
300 M Street, SE
Suite 1102
Washington, DC 20003

RE: MUR 5625
Aristotle International, Inc.

Dear Mr. Hershkowitz:

Based on a complaint filed with the Federal Election Commission on December 6, 2004, and information supplied by your client, Aristotle International, Inc., the Commission, on December 8, 2005, found that there was reason to believe your client knowingly and willfully violated 2 U.S.C. § 438(a)(4), and instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that a knowing and willful violation has occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief that you may submit will be considered by the Commission before proceeding to a vote on whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

You may also request an oral hearing before the Commission. See "Procedural Rules for Probable Cause Hearings," 72 Fed. Reg. 64919 (Nov. 19, 2007). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent


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Letter to Mr. Hershkowitz, Esq.
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expects to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted.

Should you have any questions, please contact Christine C. Gallagher, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomasenia P. Duncan". The signature is fluid and cursive, with a large initial "T" and a stylized "D".

Thomasenia P. Duncan
General Counsel

Enclosure
Brief

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)

4) MUR 5625
5)
6)

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8
9 Aristotle International, Inc.

10 **GENERAL COUNSEL'S BRIEF**

11 **I. INTRODUCTION**

12 This matter was generated by a complaint filed with the Federal Election Commission by
13 National Geographic and Political Software ("NGP") alleging Aristotle International, Inc.
14 ("Aristotle") violated the Federal Election Campaign Act of 1971, as amended, ("the Act"). The
15 Commission found reason to believe that Aristotle knowingly and willfully violated 2 U.S.C.
16 § 438(a)(4) based on information suggesting that Aristotle downloads data from the Federal
17 Election Commission website and incorporates the data into an upgrade of its Campaign
18 Manager 5 ("CM5") software product. NGP's complaint also notes Advisory Opinion ("AO")
19 2004-24, and asserts that Aristotle's actions contravene the Act, because the purpose of the
20 upgrade was to augment the customer's ability to maximize contributions from donors.

21 The ensuing investigation revealed evidence that Aristotle knowingly and willfully
22 violated the Act by selling historical contribution data for individual donors obtained from the
23 FEC website (hereinafter referred to as "FEC data") to its customers for commercial purposes.
24 In addition, a separate and distinct violation occurred when Aristotle touted the CM5 upgrade's
25 use as a solicitation tool, and failed to incorporate warnings regarding restrictions on the sale and
26 use of FEC data, either internally on the product itself or externally on marketing material, user
27 manuals, and contracts. Last, Aristotle's impermissible commercial sale of FEC data occurred,
28 and continues to occur, despite its knowledge of the Commission's position that such activity
would violate the sale and use provision contained in the Act. See AO 2004-24.

Based on the following factual and legal analysis, the General Counsel is prepared to recommend that the Commission find probable cause to believe that Aristotle International, Inc. knowingly and willfully violated 2 U.S.C. § 438(a)(4).

II. FACTUAL AND LEGAL ANALYSIS

In April 2004, Aristotle launched an upgrade to its CM4 software product, called CM5. Answers to Interrogatories and Document Requests, March 24, 2006, at 1 and 2. The upgrade to CM5 included a feature called the "Compliance/Vetting" screen.¹ *See id.* at 3(a). The feature operates by Aristotle downloading FEC data from the Commission's online public records database onto its own computer server. Then, through the sale of its software product CM5, Aristotle makes the FEC data available to its customers in a format that limits a customer's access to, and use of, the information. *See id.*; *see also*, Response to Complaint, February 14, 2005, at 1-3, 8-10. Specifically, the FEC data at issue are individual contributor donation histories, which Aristotle's customers can access by typing in the name of a contributor at CM5's Compliance/Vetting screen. *See id.* The contributor's aggregate contribution history is then displayed, including the dates, amounts, committees (federal, state and PACs), candidates and type of contributions the particular donor has made. *See id.* Names and addresses of contributors are not provided through CM5. *See id.* Aristotle's customers have contributor names and addresses in their own databases based on information not obtained from FEC records. *See id.*

In order to establish a violation of the sale and use provision of 2 U.S.C. § 438(a)(4), it is necessary to show that Aristotle sold or used the FEC data for commercial purposes, and that its

¹ This screen was originally named the "Donations" screen. It was renamed to "Compliance/Vetting" during the first week of August 2004. *See Responses to Request For Additional Information*, August 21, 2006, at II.1. According to Aristotle, the feature's name was changed in consideration of the issues raised by NGP's Advisory Opinion request in AO 2004-24, made June 15, 2004. *See Answers to Interrogatories and Document Requests*, March 25, 2006, at 3(c).

1 activity does not fall under the regulatory exemption at 11 C.F.R. § 104.15(c) ("media
2 exemption"), which sets forth that the use of FEC data obtained from reports filed with the
3 Commission is permissible in "newspapers, magazines, books or other similar communications"
4 as long as "the principal purpose of such communications is not to communicate any contributor
5 information listed on such reports for the purpose of soliciting contributions or for other
6 commercial purposes." 11 C.F.R. § 104.15(c). We address these issues below.

7 **A. Aristotle Sells FEC Data For Commercial Purposes in Violation of the Act.**

8 The Act requires the Commission to make disclosure reports available to the public
9 within 48 hours of the Commission's receipt of such reports; however, "any information copied
10 from such reports or statements may not be sold or used by any person for the purpose of
11 soliciting contributions or for commercial purposes...." 2 U.S.C. § 438(a)(4). Title 11 of the
12 Code of Federal Regulations prohibits use of data from reports "for any commercial purpose."
13 11 C.F.R. § 104.15(a).

14 In AO 2004-24, NGP requested an Advisory Opinion on whether its software upgrade,
15 which provides historical contribution data for individual donors pulled from the FEC's Web
16 site, was in compliance with the Act. The Commission determined that the upgrade would
17 violate 2 U.S.C. § 438(a)(4) and 11 C.F.R. § 104.15(a), stating that "[t]he proposed sale or
18 inclusion of information about contributors (other than information about political committees
19 that are contributors) obtained from FEC's public records. . . would be prohibited under the Act's
20 restriction on the sale or use of such contributor information." AO 2004-24 at 2.

21 The Commission's reasoning in AO 2004-24 follows one of the most recent cases on
22 point. *See Federal Election Comm'n v. Legi-Tech, Inc.*, 967 F. Supp. 523 (D.D.C. 1997). In
23 *Legi-Tech*, the United States District Court for the District of Columbia granted the

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1 Commission's motion for summary judgment, finding that the sale of subscriptions to Legi-
2 Tech's Campaign Contribution Tracking System ("CCTS") violated the commercial use
3 provision of Section 438(a)(4). Legi-Tech sold to subscribers lists of donors compiled from FEC
4 data so that subscribers could solicit those donors. Discovery revealed that Legi-Tech had
5 "actual or constructive knowledge that at least some of its customers planned to use or had
6 already used the CCTS information to solicit funds from customers." *Id.* at 526. Despite
7 knowing that one customer planned to use the CCTS information to monitor contributions and
8 solicit the same from contributors who had not exhausted their contribution limits, Legi-Tech
9 twice renewed its contract with that customer. *Id.* at 528 and note 5 ("A major use . . . will be to
10 look up contributors for a particular election cycle and see if they have [exhausted] their limit
11 amount to any candidate, so that *if not, they can be approached for a further contribution pledge.*
12 . . .)(emphasis added). The court specifically found Legi-Tech in violation of the commercial
13 purposes clause of the Act. *Id.*

14 Similar to Legi-Tech, Aristotle was selling, and continues to sell, FEC data for
15 commercial purposes by downloading the individual contributor histories from the FEC website
16 and then selling this information to its customers through the CM5 software product. Moreover,
17 Aristotle touted in its initial marketing materials for CM5 the fact that its customers would have
18 access to "enhanced and cleaned FEC contributor data" through the purchase of CM5 and
19 explained how to use the FEC data as a solicitation tool. *See* Complaint, at Exhibit 1, p. 2 and
20 Exhibit 4, p.1. Notably, Aristotle is conducting activity that is identical to that addressed in AO
21 2004-24: collecting contributor information from the Commission's public records and including
22 it as part of a software upgrade. AO 2004-24 at 2-3. The AO concludes that the use of
23 contributor information described by NGP's request as prohibited based on its commercial

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1 purpose. *Id.* Thus, even if, *arguendo*, Aristotle now intends its clients to use the contributor
2 information solely for compliance purposes, Aristotle itself is using the data for commercial
3 purposes, *i.e.*, to sell its software.

4 The phrase "knowing and willful" indicates that "actions [were] taken with full
5 knowledge of all of the facts and a recognition that the action is prohibited by law." 122 Cong.
6 Rec. H 2778 (daily ed. May 3, 1976); *see also Federal Election Comm'n v. John A. Drame* for
7 *Cong. Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986) (distinguishing between "knowing" and
8 "knowing and willful"). A knowing and willful violation may be established "by proof that the
9 defendant acted deliberately and with knowledge" that an action was unlawful. *United States v.*
10 *Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). In *Hopkins*, the court found that the evidence did not
11 have to show that a defendant "had specific knowledge of the regulations" or "conclusively
12 demonstrate" a defendant's "state of mind," if there were "facts and circumstances from which
13 the jury reasonably could infer that [the defendant] knew her conduct was unauthorized and
14 illegal." *Id.* at 213 (quoting *United States v. Bordelon*, 871 F.2d 491, 494 (5th Cir.), *cert. denied*,
15 493 U.S. 838 (1989)). Here, Aristotle was aware of the Commission's conclusion in AO 2004-
16 24, as evidenced by its comments submitted on August 11, 2004 to the draft Advisory Opinion,
17 and by use of the final Advisory Opinion in its marketing materials, yet Aristotle continued to
18 use FEC data in its software upgrade and used its software upgrade for commercial purposes.
19 *See* Complaint, Exhibit 4.

20 **B. Aristotle's CM5 Compliance/Vetting Feature Does Not Meet the Criteria of**
21 **the "Media Exemption" at 11 C.F.R. § 104.15(c).**
22

23 The Commission's regulations articulate an exception for the use of FEC data in
24 "newspapers, magazines, books or other similar communications ... as long as the principal
25 purpose of such communications is not to communicate any contributor information listed on

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1 such reports for the purpose of soliciting contributions or for other commercial purposes."²

2 11 C.F.R. § 104.15(c).

3 The first prong of the "media exemption" is not met because Aristotle's CM5 software
4 product is not akin to a newspaper, book, or magazine, nor is it akin to an online news
5 information service.³ See 11 C.F.R. § 104.15(c). CM5's initial marketing materials and user
6 manuals indicate that it held itself out as a software product that could enhance the fundraising
7 capabilities of software users. See Complaint, at Exhibit 1, ("5 Reasons Why Campaigns Choose
8 Campaign Manager 5" "Reason #1: Raise More Money"); See 2004 Campaign Manager 5 User
9 Guide, at 16 ("Want to know how much to ask for from your prospects? FEC and state
10 contributor lists are now fully integrated into the Fundraising screens so you can know
11 everything about your prospect's history of contribution to others"). The second prong of the
12 exemption is not met, because, as discussed *infra*, Aristotle's initial marketing of the product and
13 failure to warn customers about the restrictions on the sale and use of FEC data (hereinafter
14 referred to as "disclaimers"), establish that the principal purpose of the incorporation of the FEC
15 data into CM5's Compliance/Vetting feature is to solicit contributions.

² The court in *Legi-Tech, supra*, determined that CCTS could not fairly be characterized as a communication that is similar to a "newspaper, magazine or book" and that Legi-Tech's CCTS failed the "principal purpose" test as articulated in 11 C.F.R. § 104.15(c). *Id.* at 530. The court focused on the following factors in determining the "principal purpose" test: (1) Legi-Tech provided its subscribers with information that was copied directly from the reports filed with the FEC; (2) Legi-Tech's sale of contributor information through CCTS was the only focus of its activity; and (3) the publication of the FEC data by Legi-Tech in CCTS was unlike the incidental reporting of contributor information in "news stories, commentaries, or editorials." *Id.*

³ In MUR 5155 (TRKC, Inc.), the Commission found reason to believe that TRKC, Inc. violated 2 U.S.C. § 438(a)(4), but determined to take no further action. TRKC, Inc. is an Internet news and tracking service that assists media organizations, corporations, trade associations, individuals and non-profit groups with data collection, storing, transmission, linking, analysis and display of complex financial and political information. Unlike Aristotle, TRKC, Inc. did not aggregate a donor's contributions. Furthermore, as an information-gathering service, TRKC, Inc. is more akin to *Federal Election Commission v. Political Contributions Data, Inc.*, 943 F.2d 190 (2nd Cir. 1991), with respect to the information it provides and maintains. See discussion, *infra*, at 12.

**1. Aristotle Explicitly Touted How to Use FEC data in the CM5
Compliance/Vetting Feature to Solicit Contributions.**

To promote sales of CM5, Aristotle's marketing initially focused on the benefits to its customers of using the FEC data as a solicitation tool. The software was marketed through phone calls, e-mails, PowerPoint presentations, brochures, fliers, and in face-to-face meetings in software demonstrations. *See* Answers to Interrogatories and Document Requests, March 24, 2006, at 4(a).

Since April 2004, John Phillips, co-founder and current CEO of Aristotle, has been in charge of all marketing in connection with CM5. J. Phillips Declaration, at 2. Aristotle did not use an advertising agency; rather marketing for CM5 was a collaborative process between Mr. Phillips and Aristotle sales representatives. J. Phillips Declaration, at 2. In March 2004, Mr. Phillips drafted marketing materials, which describe how the FEC data could be used to solicit donations. The first piece is entitled "5 Benefits of Campaign Manager 5":

Only Campaign Manager 5 instantly tells you how much your contributors have given to other state and *federal* candidates, PACs or party organizations – insuring you're not leaving money on the table when soliciting a contribution. Don't ask for \$250 from a donor who gives \$1,000 to others. (*Italics added*).

J. Phillips Declaration, at Attachment 1. The second piece of marketing material drafted by John Phillips is entitled, "Introducing the New Features of Campaign Manager 5.0," and it also describes how to use the FEC data for solicitations:

Predictive Fundraising features: These features allow users to set target amounts for fundraisers both individually and by groups. Additionally, donors are automatically cross-referenced with Aristotle's *Federal* and State contributor files, which allows fundraisers to get instant information about each of their donor's histories outside of their particular committee. (*Italics added*).

Users can set target amounts to groups of lists or by fundraising staff. These groups can be tracked and reported upon. Individual

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contributor information is directly and automatically linked to *FEC* and State contributor files to get a donor history outside of the particular campaign. For example, if John Smith gave the campaign \$150, users can look at John Smith's contributions to other campaigns and find out that he gave \$1000 to another campaign. Armed with this information, the fundraisers can change the "ask" amount for John Smith. (*Italics added*).

J. Phillips Declaration, at 3.

According to Mr. Phillips, there was a period of time for two or three months during the Spring of 2004 when some marketing material was released to the public that was not "scrubbed" by Aristotle's legal department. J. Phillips Declaration at 3. It appears that Aristotle sales staff sent marketing materials to its clients that included references to CM5's ability to use FEC data for solicitation. For example, in April 2004, Bret Garwood, an Aristotle sales representative, sent an e-mail to his fellow sales representatives attaching marketing material. His e-mail states, "fyi- Attached are some things I send [sic] out to campaign." One of the attachments to his e-mail is a document similar to the "5 Benefits of Campaign Manager 5" document. There are only minimal differences in the document. The title is changed to "5 reasons why you'll love the new Campaign Manager 5." Most notably, the reference to the ability of CM5 to tell the customer how much a donor has given to federal candidates and how the customer can use that information to facilitate contribution solicitation is still present. Another piece of marketing material attached to Garwood's e-mail is identical to the "Introducing the New Features of Campaign Manager 5.0" piece. Also attached to Garwood's e-mail is a document entitled "What to cover in a CM Demo." Under the fundraising and event tracking bullet point, the document states: "Cover the new Pledge and Target System. For the oh ah factor show the new Donor lookup and focus on how it will prevent them from leaving money on the table."

Further, the ability to use FEC data for fundraising purposes was noted by Aristotle to prospective and current clients. For example, in what appears to be a proposal to purchase CM5 in an e-mail from B. Garwood to _____ dated November 28, 2004, the benefits of the software are listed as including: "Increase fundraising effectiveness/FEC Contributor Match: Bring forth all Federal and State donations a contributor/supporter has made to other state and federal candidates. Contribution history updated with a click of a button!" Similarly, after a sale was completed, it appears that the CM5 manual was sent to the customer, together with a form letter listing CM5's new features, and mentioning the ability to "access advanced fund-raising information on state and federal contributors from within CM5." See e-mail and attachment from Valerie A. Kessler to Alicia Lovejoy, dated June 8, 2004.

2. Disclaimers Were Added By Aristotle To CM5 After it Became Aware of AO 2004-24 And In Some Instances After NGP's Complaint Was Filed.

Disclaimers warning customers about the impermissible use and sale of FEC data were not placed on CM5's Compliance/Vetting screen at the time CM5 was first launched. It appears that the earliest date the disclaimer appeared on the Compliance/Vetting screen was in August of 2004 (four months after the product was launched) and it was added in consideration of the issues raised in NGP's Advisory Opinion Request.⁴ See Dean Phillips Declaration at 3; see also Answers to Interrogatories and Document Requests, March 24, 2006, at 3(b) and 3(c). In addition, the evidence establishes that solicitation e-mails and CM5 fliers lacked disclaimers. Beginning in August 2004, disclaimers were added to Sales Representatives' PowerPoint presentations; and in January 2005, disclaimers were added to the user manuals. The disclaimer

⁴ "The warning reads as follows: "FEC DATA WARNING!!! Any information copied, or otherwise obtained, from any FEC report or statement, or any copy, reproduction, or publication thereof, filed under the Act, shall not be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose, except that the name and address of any political committee may be used to solicit contributions from such committees."

1 did not consistently appear on all CM5 contracts until February 2005. Last, as of March 2005,
2 PowerPoint presentations accessible on Aristotle's Website still lacked disclaimers where CM5's
3 Compliance/Vetting feature was referenced.

4 *a) E-mail Solicitations*

5 The Complaint attaches an e-mail from Aristotle to an individual at a political campaign,
6 which appears to be enticing the contact to switch from its competitor NGP to the CM5 software
7 product. Complaint, at Exhibit 3. The e-mail was a special post-election promotion sent to
8 several hundred NGP customers in November 2004. See Responses to Request for Additional
9 Information, August 21, 2006, at I.13. The e-mail, which is dated November 8, 2004 (eight
10 months after the product was first launched), references "Free access to enhanced and cleaned
11 FEC contributor data back to 1992." In addition, it contains the following language: "Smarter
12 Fundraising. Only Campaign Manager tells you how much your contributors have given to other
13 candidates, PACs and parties. Not available with NGP or any other software program."
14 However, there is no disclaimer on the e-mail regarding the prohibition on the sale and use of
15 FEC data. See *id.*

16 *b) Fliers*

17
18 Fliers advertising CM5 did not contain any disclaimers. On November 1, 2004, Buck
19 Stoll, Vice President of Sales, e-mailed an electronic version of the CM5 flier to his staff. See
20 Complaint, at Exhibit 4. The purpose of the flier was to entice people to switch from NGP to
21 Aristotle. *Id.* The flier reads, "Free access to enhanced and cleaned FEC contributor data back
22 to 1992." *Id.* No disclaimers regarding the restrictions on the sale or use of FEC data are
23 mentioned, even though the flier references the Commission's opinion in AO 2004-24. *Id.*

c) PowerPoint Presentations

Aristotle's sales representatives used PowerPoint presentations in meetings with prospective CM5 clients to sell the software. *See* Answers to Interrogatories and Document Requests, March 24, 2006, at 4(a). The PowerPoint presentations contained screenshots from the Compliance/Vetting feature of CM5. *Id.* Initially, the screen-shots of the Compliance/Vetting feature in the PowerPoint presentations identified a donor's contribution history to a federal campaign, and the language next to the screen-shot described how to solicit contributions using this information, and no disclaimer was present. According to Aristotle, the screen-shots to the sales representatives PowerPoint presentations were changed and disclaimers added in August 2004. *See* Answers to Interrogatories and Document Requests, March 24, 2006, at 4(d).

In addition to PowerPoint presentations used by sales staff, Aristotle's website contained a PowerPoint presentation on the benefits of CM5. A review of archived web pages from www.internetarchive.org found PowerPoint presentations from December 5, 2004, January 10, 2005 and March 6, 2005, and none of them contain disclaimers regarding the FEC data referenced therein. This time frame is after Aristotle received notice of NGP's complaint filed in this matter in December 2004.

d) Contracts

Based upon our review of the [] CM5 contracts provided to us by Aristotle during the investigation, it appears that disclaimers did not consistently appear on each contract until February of 2005. [] For example, a contract with one customer, [], signed December 22, 2004, does not contain any disclaimer specifically referencing FEC data.

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e) User Manuals

In 2004, the user manuals for CM5 highlighted the new feature of the software product stating, "Want to know how much to ask for from your prospects? FEC and state contributor lists are now fully integrated into the Fundraising screens so you can know everything about your prospect's history of contributions to others." During the week of January 6, 2005, the manuals were revised to delete this language and add disclaimers against the sale and use of FEC data. *See Responses to Request for Additional Information*, August 21, 2006 at II. 4. The changes to the user manual were not made until after Aristotle received notice of NGP's complaint filed in this matter in December 2004. *See id.*

f) Customer Use of the Compliance/Vetting Feature

While the investigation has not uncovered an impermissible use of the FEC data by Aristotle's customers, this fact is not dispositive to establishing a violation of 2 U.S.C. § 438(a)(4).⁶ Both the U.S. District Court for the District of Columbia in *Legi-Tech, supra*, and the Second Circuit in *Federal Election Commission v. Political Contributions Data, Inc.*, 943 F.2d 190 (2nd Cir. 1991), found the defendants had actual or constructive knowledge that their communications could be used by customers to solicit contributions or for commercial purposes. *See Legi-Tech*, at 526 (*Legi-Tech* had actual or constructive knowledge that at least some of its customers planned to use or had already used the communication to solicit funds from contributors); *see also PCD*, at 197 (of 100 PCD customers, only two said that they had purchased the reports for solicitation purposes; neither one actually solicited using PCD's lists; and one of them noted the disclaimer and the lack of addresses as factors which led them to

⁶ According to information obtained from Aristotle, its sales representative, Bret Garwood, informed one customer, [redacted] about the prohibition against the sale and use of FEC data, after receiving an inquiry about the Compliance/Vetting feature. *See Supplemental Answers to Interrogatories and Document Requests*, May 15, 2006 at p. 264.

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1 abandon that idea). The District Court held that a violation of the sale and use provision
2 occurred in the *Legi-Tech* case, but the Second Circuit held that a violation of that provision did
3 not occur in the *PCD* case.

4 In *PCD*, the Second Circuit found the use of FEC data permissible. *PCD* collected and
5 sorted FEC data by congressional district and employer and sold the lists. The court noted that
6 the lists did not contain contributors' addresses or phone numbers, and that the lists did contain
7 disclaimers warning against unauthorized use of such data. The District Court in *Legi-Tech*
8 criticized *PCD*'s interpretation of Section 438(a)(4). *See Legi-Tech*, at 531 ("[PCD] narrowly
9 construed Section 438(a)(4) to proscribe only the use of the FEC information for soliciting
10 contributions..." and "...read the phrase 'for commercial purposes' out of the statute.").
11 Moreover, even applying *PCD*'s narrow construction to the facts in this matter, Aristotle's
12 activity would still be proscribed. First, the CM5 manuals, contracts, and marketing materials,
13 show that the Compliance/Vetting feature was initially exclusively referred to in the context of
14 enabling its customers to solicit contributions; there was no mention of how to use the feature for
15 compliance purposes. Second, unlike *PCD*, Aristotle did not begin to include disclaimers about
16 the impermissible use and sale of FEC data in any of its marketing materials, contracts, manuals,
17 PowerPoints and Website until at least after it became notified of NGP's Advisory Opinion
18 request in August 2004. Third, unlike *PCD* (whose contributor lists did not provide mailing
19 addresses or phone numbers), CM5 provides access to FEC data for individuals whose names
20 and addresses the customer already has in its database *See Answers to Interrogatories and*
21 *Document Requests*, March 24, 2006, at 3. Coupled with the FEC data on contribution histories
22 provided through the Compliance/Vetting feature, customers conceivably could follow
23 Aristotle's initial marketing suggestions and contact contributors for impermissible purposes,

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1 which is the type of activity 2 U.S.C. § 438(a)(4) seeks to prevent. *See PCD*, 943 F.2d at 197
2 (“[t]he absence from PCD’s reports of mailing addresses and phone numbers, as well as the
3 caveat on each page against solicitation and commercial use, make it virtually certain that these
4 reports will be used for informative purposes...”).

5 In sum, the initial marketing and lack of disclaimers establish that the principal purpose
6 of what Aristotle now calls its Compliance/Vetting feature is to enable solicitation, rather than
7 for purported compliance purposes. The software provides customers with a donor’s
8 contribution histories, showing that the FEC data’s intended use is to generate prospective
9 customers, as was explicitly stated in one of Respondent’s initial marketing documents: “When
10 soliciting a contribution, Campaign Manager 5 will tell you exactly how much the prospect has
11 given to others, which suggests how much you should ask for.” Complaint, at Exhibit 1.

12 C. Aristotle Continues to Sell FEC Data For Commercial Purposes in Violation
13 of the Act.
14

15 Even though Aristotle has deleted the impermissible language and has added disclaimers
16 from its marketing materials and other documents related to CM5, Aristotle’s commercial sale of
17 the FEC data establishes a violation of the Act. For example, in AO 1991-16, the Commission
18 determined that a proposed database containing the names, cities and states of individual
19 contributors and donor histories copied from reports filed with the Commission would violate
20 Section 438(a)(4). The information would be sold to Indiana State and legislative offices for the
21 purported purpose of helping Indianans understand more about who is financing campaigns and
22 in what amounts. The Commission stated the sale of this information would be for commercial
23 purposes because the use of the contributor information from committee reports would not be
24 incidental to the sale; the contributor information would be, in fact, what the AO requestor
25 intended to sell. *See* AO 1991-16 at 3, *citing* AO 1986-25. Similarly, Aristotle is intending to

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1 sell the FEC data to its customers through the Compliance/Vetting feature of CM5. Given that
2 the FEC data in this matter consists exclusively of individual contributor donor history
3 information reported to the Commission, that this data is incorporated into the CM5 software
4 product, that it is sold by Aristotle to its customers, and that the "media exemption" of 11 C.F.R.
5 § 104.15(c) does not apply, then the commercial sale of this information is the primary purpose
6 of the sale.

7 Therefore, the General Counsel is prepared to recommend that the Commission find
8 probable cause to believe that Aristotle International, Inc. knowingly and willfully violated
9 2 U.S.C. § 438(a)(4).

10 **III. GENERAL COUNSEL'S RECOMMENDATION**

11 Find probable cause to believe that Aristotle International, Inc. knowingly and willfully
12 violated 2 U.S.C. § 438(a)(4).

13
14 June 10, 2009
15 Date

16
17 Thomasenia P. Duncan
18 Thomasenia P. Duncan
19 General Counsel

20
21 Kathleen M. Guith
22 Kathleen M. Guith
23 Deputy Associate General Counsel for Enforcement

24
25 Sidney Rocks
26 Sidney Rocks
27 Assistant General Counsel

28
29 Christine C. Gallagher
30 Christine C. Gallagher
31 Attorney

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